Still a flawed decision

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It might come as a surprise at first glance but I fully agree with most of what Daniel wrote. I simply don't think that it can count as a defence of the Court's decision. Daniel's initial impulse seems to be that most critical contributions so far have indulged in judicial soul-searching through the blurring lens of human rights protection and neglected the nitty-gritty of the legal issues, especially their constitutional significance. However, the outrage among the early commentators – including my own biblical allusion to the CJEU as a jealous entity that tolerates no other courts before it – is not entirely based on emotions but on the sober appraisal of the tone and the arguments of the Court. Having done that, I still see little space for a charitable reading of Opinion 2/13. Daniel himself starts with a comparison of AG Kokott's view and the Court's decision (p. 3). His assessment doesn't sound too different from how I would describe the difference between the two documents: the Advocate General seeks solutions, the CJEU seeks problems.

Acceptable parts of the Opinion

Make no mistake: Opinion 2/13 contains some fully acceptable parts, namely the points about the co-respondent mechanism and Article 344 TFEU which Daniel endorses wholeheartedly (pp. 11 et seqq.). Those are the issues where the Court was only overly cautious in my opinion.

I think it is indeed legally compelling to demand a mandatory co-defendant mechanism in all cases involving EU law including those where only the interpretation of EU law is concerned. In fact, I had strongly argued for such a mechanism in a 2012 article on an earlier draft of the accession agreement (cf. pp. 101-103 here) and I was pondering for a very long time if I should dispute the compatibility of the final draft with the autonomy of EU law. I finally decided against it and contended in my doctoral thesis (cf. pp. 104-112 here) that Article 3 of the draft accession agreement leaves enough leeway for a very broad reading in a spirit of comity between the courts so that an interpretative declaration would have sufficed. Contrary to Daniel, I don't believe that a minimal plausibility check on whether EU law plays a part in the dispute could really threaten the autonomy of EU law but I must admit that I had been sitting on the fence myself.

The Court's stance on the possible use of Article 33 ECHR in the scope of EU law is the least problematic. My personal attitude is congruent with that of AG Kokott: we don't really need a clarification because Article 344 TFEU says all there is to say but, anyway, a unilateral declaration would be enough. Daniel thinks that a binding declaration is necessary but sufficient (p. 15) so there isn't too much to write home about. If the parties return to the negotiating table it shouldn't be too difficult to include a satisfying rule in the agreement.

Unacceptable parts of the Opinion

The contrary is true when we turn to the Court's reasoning on Protocol No 16, the two Articles 53 and mutual trust in the AFSJ. I will not repeat my pre-Christmas philippic now but focus on Daniel's elaborations.

As far as Protocol No 16 is concerned, Daniel's stance seems to be: as long as the EU itself is not a Party to Protocol No 16 and the national courts are acting within the scope of EU law, i.e. as functional EU courts, Strasbourg should be barred from accepting requests for an advisory opinion. I don't find that convincing for three main reasons. First, as AG Kokott correctly stated, the dreaded situation could happen anytime without accession. Second, it is the internal task of EU law to safeguard the compliance of the highest national courts with their obligations under Article 267(3) TFEU. Third, I don't see too much of a difference in comparison with an individual complaint lodged after a failure to submit a preliminary reference to the CJEU. The inapplicability of the local remedies rule is compensated by the introduction of the prior involvement procedure. If Luxembourg's involvement at that stage "just adds insult to injury from the CJEU's perspective, because the entire dispute should be in Luxembourg" (p. 17), the same reasoning must apply to all other cases in which national courts fail to see or simply ignore the EU law implications of a case. One should bear in mind that the prior involvement mechanism is Luxembourg's favourite toy and all that it had asked for before the negotiations. It is now all that it can ask for with regard to Protocol No 16.

Apart from that, I am delighted to read that even a pronounced defender of the Court's decision like Daniel can't see any merit in the so-called reasoning on the two Article 53s and backs the standpoint I expressed in my previous post. Besides, I absolutely agree with Daniel's assessment that the idea of a minimum standard clause doesn't make much sense in so-called multipolar constellations, anyway (pp. 18 et seqq.).

Moreover, Daniel fully vindicates my position on the mutual trust issue. Indeed, we see eye to eye that "non-accession is the outcome the Court should really fear" (p. 25), and I endorse his carefully thought-through appraisal of the legal situation (pp. 20 et seqq.).

Finally, there is the special problem of CFSP jurisdiction. I agree with Daniel that we should scrutinise the Court's stance purely from a constitutional perspective (p. 30) because that is the standard the Court was supposed to apply. However, I still find AG Kokott's constitutional approach far more convincing. The Court should have had the wisdom to acknowledge that an external control in CFSP matters is already possible whenever the alleged human rights violation is partly attributable to one of the Member States (cf. p. 32) and that the accession agreement would at least have given the EU the possibility to defend itself – even if the Court itself had not been involved beforehand. By the way, it is no particularity of the European Union that the courts have only very limited competencies in the field of foreign policy except where palpable individual rights of domestic citizens are concerned. A broad reading of Article 275(2) TFEU should have sufficed to put the CJEU in a similar position

as most of the Member States' high courts – which is all that it can legitimately demand. Against this backdrop, I find Daniel's conclusion on p. 36 rather worrying. Of course, most legal scholars would find it great to grant the CJEU comprehensive jurisdiction over the whole range of EU law. But the Member States might have good reasons not to do it – and they are the masters of the treaties. It is constitutionally unacceptable to extort the Member States either to give the CJEU more power or to call on Russia for negotiations to cut back Strasbourg's competencies in foreign policy matters – especially in the current geopolitical situation.

Conclusion

I still think that Opinion 2/13 is a flawed decision driven by political objectives. The Court piled up all points it could possibly craft to reject the whole accession agreement out of hand. To make things worse, it dropped no hint as to whether a solution underneath the threshold of cumbersome – and probably futile – renegotiations could be acceptable. That's what angers me most: even if the Court had real constitutional concerns, it could easily have found a way to work around the consequences set out in the 2nd sentence of Article 218(11) TFEU and demand some cosmetic surgery along the lines that AG Kokott had suggested – maybe something in the style of the German Federal Constitutional Court's judgments on the Treaties of Maastricht and Lisbon and on the implementation of the ECHR. Instead, it reiterated time and again that "the agreement" as such does not satisfy the requirements of EU law, and the tone of the decision is adamantly dismissive of the whole idea of accession to the ECHR. Consequently, nobody can tell whether the Court wanted to say "no unless", as Daniel suggests on p. 11, or simply "no". The path to accession is very obscure after Opinion 2/13 – so much so that it is unclear if any accession agreement at all would withstand the Court's scrutiny next time.
